

# Judicial Protection of Human Rights in the Netherlands

## - National and international legal framework

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### I. Preliminary note on the Netherlands

The Kingdom of the Netherlands consists of four autonomous component States: (1) the Netherlands, which, in addition to the territory in Europe, includes the Caribbean islands of Bonaire, Sint Eustatius (Eustace) and Saba; (2) Aruba; (3) Curaçao; and (4) Sint Maarten (Saint Martin).<sup>1)</sup> The Charter for the Kingdom of the Netherlands functions as a constitution

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- 1) The Kingdom of the Netherlands has several characteristics of a federation. Thus, the four constituent States (the Netherlands and the islands Aruba, Curaçao and Sint Maarten) are constitutionally autonomous, and the powers of both the Kingdom and the component States are vested in the Charter of the Kingdom of the Netherlands. However, the Organs of the Kingdom to a large extent overlap with the Organs of the largest component State, the Netherlands. Article 53 of the Charter of the Kingdom of the Netherlands provides for independent supervision of the expenditure of funds that are made according to the budgets of Aruba, Curaçao or Sint Maarten, by the Court of Audit (at the request of the State to whom it concerns). On the other hand, there is (yet) no constitutional procedure for the settlement of disputes between the Kingdom on the one hand and the component States on the other hand. See: C. Borman, *Het Statuut voor het Koninkrijk* [The Charter for the Kingdom], Deventer: Kluwer 2012, p. 26. See also: Janneke Gerards and Joseph Fleuren, "The Netherlands", in: Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law*, Cambridge/Antwerp/Portland: Intersentia 2014, pp. 217-260, p. 217. Although the authors are of the opinion that the Kingdom has a federal structure, they recognize its atypical structure.

for the Kingdom. However, the Constitution of the Netherlands as a component State, in several respects, also entails provisions of constitutional law for the Kingdom.<sup>2)</sup>

While the four constituent States are autonomous with respect to most of their internal affairs, their external relations are a matter of the Kingdom.<sup>3)</sup> Consequently, treaties and binding decisions of international organisations to which the Netherlands is a party, bind all four constituent States, unless it is expressly provided for that they only concern one or some of them.<sup>4)</sup> This also implies that the international legal obligations by which the Kingdom of the Netherlands is bound, are binding for the four constituent States. Moreover, Article 43, paragraph 2, of the Charter of the Kingdom of the Netherlands declares that guaranteeing fundamental rights and freedoms is a concern of the Kingdom.

The foregoing means that, although in what follows reference is made exclusively to the Netherlands, the same applies to the three other constituent States of the Kingdom.

## II. Introduction

One can no longer imagine an international legal order without human rights standards being part of it. These standards constitute legal obligations for all States; if not obligations ensuing from treaties to which the States have become parties, then as obligations *erga omnes*, in some cases even *jus cogens*, as general principles of international law, and as customary international law.<sup>5)</sup>

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2) Article 5 of the Charter of the Kingdom of the Netherlands. The first paragraph reads as follows: "The Monarchy and the succession to the Throne, the Organs of the Kingdom referred to in the Charter, and the exercise of royal and legislative power in Kingdom affairs shall be governed, if not provided for by the Charter, by the Constitution of the Kingdom."

3) Article 3(b) of the Charter of the Kingdom of the Netherlands.

4) Articles 11, paragraph 3, and 24-28 of the Charter of the Kingdom of the Netherlands.

5) See: Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles of Law", 12 *Australian Yearbook of International Law* 1988-1989, pp. 82-108, p. 104. See also: Dinah Shelton, "Are there Differentiations among Human Rights? *Jus Cogens*, Core Human Rights, Obligations *Erga Omnes* and Non-Derogability", in: Venice Commission, *The status of international treaties on human rights*, Collection Science and technique of democracy, No. 42, Council of Europe 2006, pp. 159-186. The International Court of Justice, as early as in 1970, held that the most fundamental human rights, including protection from slavery and racial discrimination, form part of *jus cogens* or at least customary law binding for all States;

The codification of human rights in international treaties was mainly a reaction to the atrocities of National Socialism in the years before and during the Second World War. In 1941, Churchill and Roosevelt launched the “four freedoms” in the Atlantic Charter: freedom of life, freedom of religion, freedom from want and freedom from fear. After the war had ended, the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, was a significant first step towards codification of most of the then generally recognised human rights, inspired by famous national “bill of rights” as the *Magna Charta* of 1215, the Bill of Rights integrated as amendments in the American Constitution of 1787, and the *Déclaration des droits de l’homme et du citoyen* of 1789.<sup>6)</sup>

The nucleus of the Universal Declaration was soon incorporated in the legally binding European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted within the Council of Europe and signed in Rome on 4 November 1950.<sup>7)</sup> A little more than a decade later member States of the Council of Europe signed the European Social Charter, on 18 October 1961.<sup>8)</sup> In the framework of the United Nations, the rights formulated in the Universal Declaration were elaborated and laid down in two legally binding documents: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the General Assembly of the United Nations on 16 December 1966. Many human rights treaties followed, both in the framework of these two and in that of other international organisations, at the universal and at different regional levels.<sup>9)</sup> At present, Asia is the only region that does

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judgment of 5 February 1970, *Barcelona Traction Light and Power Company, Limited (Belgium v. Spain)*, *Second Phase*, I.C.J. Reports 1970, paras 33-34; see also: advisory opinion of 9 July 2004, *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, I. C. J. Reports 2004, p. 136, paras 88, 155 and 156. The International Criminal Tribunal for Yugoslavia added the prohibition of torture; decision of 10 December 1998, *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, <www.icty.org>, para. 151.

6) For these texts, see <www.legislation.gov.uk> and Ph. Kiiver (ed.), *Sources of constitutional law: constitutions and fundamental legal provisions from the United States, France, Germany, the Netherlands, the United Kingdom, the ECHR and the EU*, Groningen: Europa law publishing 2010.

7) *Council of Europe Treaty Series*, No. 5.

8) *Council of Europe Treaty Series*, No. 35.

9) For a compilation of the most important United Nations treaties, see the *United Nations Treaty Series On Line Collection*. See also: *International instruments of the United Nations: a compilation of agreements, charters, conventions, declarations, principles, proclamations, protocols and treaties: adopted by the General Assembly of the United Nations, 1945-1995*, New York: United Nations

not have a regional legal instrument for the protection of human rights.<sup>10)</sup>

The international codification and integration of human rights brought about a fundamental change in the character of international law: (1) individuals and private legal persons have become legal subjects of international law next to the sovereign States; (2) the States have a primary duty to implement their international human rights obligations towards the individuals and legal persons under their jurisdiction and only an additional one vis-à-vis other States; and (3) implementation is in many cases subject to subsidiary international supervision.<sup>11)</sup>

### III. Protection of human rights by Dutch courts

The judicial system in the Netherlands is a rather complex one. Civil and criminal jurisdiction lies in the hands of the District Courts of first instance, the Courts of Appeal and the Court of Cassation. Administrative disputes are, in the first instance, dealt with for the larger part by the administrative sections of the District Courts, unless the law designates a special administrative court of first instance. The main such special administrative court is the Administrative Jurisdiction Division of the Council of State, especially for disputes concerning rural (spatial) planning and election law. In addition to being an administrative court of first and final instance, the Administrative Jurisdiction Division of the Council of State has also general competence to decide on appeals lodged against decisions of the administrative sections of the District Courts. However, the Central Appeals Board for Social Security hears appeals in cases involving social security law, public service law, pensions and student grants and loans, while appeals against decisions made under certain statutes in the socio-economic field, in particular in the field of competition law, come

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1997. For regional human rights treaties, see: Council of Europe, *Basic Texts*, Strasbourg 2015 <[www.coe.int](http://www.coe.int)>.

10) See: Amartya Sen, *Human Rights and Asian Values* (Sixteenth Morgenthau Memorial Lecture on Ethics & Foreign Policy), New York: Carnegie Council on Ethics and International Affairs 1997. For some recent developments in the region, see: K. Setiawan, *Promoting Human Rights. National Human Rights Commissions in Indonesia and Malaysia*, Leiden: Leiden University Press 2013.

11) Marcelino Oreja, "Souveraineté des Etats et respect des droits de l'homme" [Sovereignty of States and respect for human rights], in: Franz Matscher and Herbert Petzold (eds), *Protecting Human Rights: The European Dimension. Studies in honour of Gérard Wiarda*, Berlin: Carl Heymanns 1988, pp. 7-15.

within the ambit of the Trade and Industry Appeals Tribunal. Finally, the taxation chambers of the Courts of Appeal have jurisdiction to hear appeals in tax cases. Only in the latter cases,<sup>12)</sup> with regard to tax actions, does an appeal for cassation lie with the Court of Cassation. This means that, in the field of administrative jurisdiction, there are several courts of highest instance. To promote unity in the interpretation and application of the law and in the development of the law, each of the three highest administrative courts may refer a case to a “grand chamber”, which is composed of five judges and in which members from the other highest courts may participate.

The Netherlands is a party to most of the universal and European treaties in the field of human rights. The most relevant of these treaties for Dutch legal practice are the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter (ECHR)<sup>13)</sup>, the European Social Charter (hereafter ESC),<sup>14)</sup> and the Charter of Fundamental Rights of the European Union (hereafter EU Charter),<sup>15)</sup> but also the two International Covenants of the United Nations (hereafter the ICCPR and the ICESCR),<sup>16)</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>17)</sup> the Convention on the Elimination of All Forms of Discrimination against Women,<sup>18)</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>19)</sup> the Convention on the Rights of the Child,<sup>20)</sup> and the main Conventions of the International Labour Organisation.<sup>21)</sup> In fact, especially the ECHR functioned for many

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12) And some small categories of other cases, which are not mentioned here.

13) Treaty of Rome 4 November 1950, *Council of Europe Treaty Series*, No. 5.

14) Treaty of Turin of 18 October 1961, *Council of Europe Treaty Series*, No. 35 (see also No. 163 for the Revised Social Charter of 1996).

15) *Official Journal of the European Union*, 2007/C 303/01.

16) The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Treaties of New York of 16 December 1966, *United Nations Treaty Series*, No. I-4668 and I-14531.

17) Treaty of New York of 5 March 1966, *United Nations Treaty Series*, No. I-9464.

18) Treaty of 18 December 1979, *United Nations Treaty Series*, No. I-20378.

19) Treaty of New York of 10 December 1984, *United Nations Treaty Series*, No. I-24841.

20) Treaty of 20 November 1989, *United Nations Treaty Series*, No. I-27531.

21) Some of the most fundamental treaties are the Forced Labour Convention 1930, *ILO Treaty Series*, No. C029; Protocol of 2014 to the Forced Labour Convention 1930, *ILO Treaty Series*, No. P029; the Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 87), *ILO Treaty Series*, No. C087; the Right to Organise and Collective Bargaining Convention 1949, *ILO Treaty Series*, No. C098; the Equal Remuneration Convention 1951, *ILO Treaty Series*, No. C100;

years as the factual written bill of rights for the Netherlands. However, since 1983, when social and economic rights were added, most human rights have been incorporated in the Netherlands Constitution.<sup>22)</sup>

For specific reasons, so far, the human rights treaties to which the Netherlands is a party play a more important role in Dutch legal practice, and especially in the case-law, than the human rights provisions of the Constitution. Since 1953, the Netherlands Constitution regulates the relationship between international and national law in a way that has been of determinant importance for this matter and has put the Netherlands in a rather exceptional position in Europe for a long time. Article 120 of the Constitution (in the version of the Constitution as it reads since the revision of 1983) stipulates that the courts shall not review the constitutionality of statutes (Acts of Parliament) and treaties, while Articles 93 and 94 of the Constitution contain an obligation for the courts to apply self-executing provisions of treaties and of binding decisions of international organisations and give them priority over conflicting domestic law.<sup>23)</sup> The latter two provisions, which for the larger part were a codification of a legal practice that had developed as customary law, make clear that the Netherlands adhere to the monist view, considering international and domestic law as belonging to one and the same legal order in which both sets of law are to be applied according to a certain hierarchy.<sup>24)</sup> This is in contrast with the dualist view, according to which the two sets of law constitute separate legal orders, which has as a consequence that international law may be applied at the national level only after it has been incorporated into domestic law through transformation or adaption.<sup>25)</sup> These views, although subject to all kinds of hybrid variations at the moment, have traditionally been used as prototype systems

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the Abolition of Forced Labour Convention 1957, *ILO Treaty Series*, No. C105; the Discrimination (Employment and Occupation) Convention 1958, *ILO Treaty Series*, No. C111; the Minimum Age Convention 1973, *ILO Treaty Series*, No. C138; the Worst Forms of Child Labour Convention 1999, *ILO Treaty Series*, No. C182.

22) For the English translation of the Netherlands Constitution, see Kiiver, *supra note 7* and the CODICES Database of the Venice Commission of the Council of Europe, <[www.venice.coe.int/webforms/events](http://www.venice.coe.int/webforms/events)>.

23) The priority rule does, however, not apply in relation to unwritten international law such as customary international law: Court of Cassation, judgment of 6 March 1959, *Nyugat II*, 10 *Netherlands International Law Review* 1963, p. 82.

24) See: Gerards and Fleuren, "The Netherlands", *supra note 2*, pp. 220-223.

25) For the long tradition of the terminology, see, e.g., J.G., Starke, "Monism and Dualism in the Theory of International Law", 17 *British Yearbook of International Law* (1936), pp. 66-81.

for the constitutional regulation of the relationship between international and national law.<sup>26)</sup>

From these provisions it follows that the courts in the Netherlands may not review statutory provisions<sup>27)</sup> for their conformity with human rights provisions in the Constitution, whereas they have the obligation to review them for their conformity with human rights provisions in treaties to which the Netherlands is a party, provided they are of a self-executing character.<sup>28)</sup> On the other hand, since practically all human rights provisions in the Netherlands Constitution have their equivalent in one or more treaties to which the Netherlands is a party, it is not difficult for Dutch courts to circumvent *de facto* the prohibition of constitutional review of statutes by reviewing their conformity with an identical or comparable self-executing treaty provision.

One of the consequences of this review system may have been that the Netherlands (still) does not have a special constitutional court, while the trend in the recent legal history of Europe and beyond<sup>29)</sup> has been to introduce such special constitutional jurisdiction. In actual fact, in the Netherlands all courts act as constitutional courts, with the Court of Cassation and the Administrative Jurisdiction Division of the Council of State as the highest constitutional jurisdictions. They do act as constitutional courts in the strict sense in all those cases where not the constitutionality of a statutory provision but of a provision of “lower” legislation is at issue, while they act as constitutional courts in a substantive sense when they review both statutory law and other legislative acts, as well as administrative acts, for their conformity with self-executing provisions of treaties and of decisions of international organisations. In the context of constitutional review, to a large extent international law supplements, if not substitutes for, the Constitution.

The fact that, in virtue of the Netherlands Constitution, human rights provisions of treaties have a stronger position in the Dutch legal order than domestic law, including the Constitution itself,<sup>30)</sup> did not automatically and immediately result in a practice in which

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26) See H.F. van Panhuys, “Relations and Interactions between International and National Scenes of Law”, 112 *Recueil des cours de l'Académie de droit international de la Haye*, 1964-II, p. 14.

27) The prohibition of Article 120 applies to statutes only, not to legal regulations that have been adopted by other authorities than Parliament, such as royal decrees, orders in council, ministerial regulations and municipal regulations.

28) For the reason of the restriction to provisions of a self-executing character, see Gerards and Fleuren, *supra* note 2, pp. 223-225.

29) For the Republic of Korea, see: Constitutional Court of Korea, *Twenty Years of the Constitutional Court of Korea*, Seoul: The Constitutional Court 2008; Rodrigo González Quintero, Judicial review in the Republic of Korea: an introduction, 34 *Revista de Derecho* 2010, pp. 1-17.

full legal force was, and is, given to human rights treaties in all cases and in all respects. This depends to a large extent on the attitude of the national authority concerned. Although the relevant provisions were included in the Constitution in 1953, one year before the ECHR entered into force for the Netherlands, that fact did not lead to full attention being given to the ECHR right away. Even almost thirty years later Alkema made the following observation:

“In spite of its direct applicability, the courts, especially the Supreme Court [*i.e.* the Court of Cassation], are apparently accustomed to treating the ECHR as a subsidiary source of law. The courts avoid, if possible, any reference to the ECHR. Where a comparable constitutional provision is available, an interpretation, sometimes a wider interpretation, of the latter is preferred to an (express) application of the ECHR.”<sup>31)</sup>

However, in the eighties that attitude changed remarkably,<sup>32)</sup> thanks to influential doctrine, commentaries and annotations by experts in the field of human rights, discussions in and publications by organisations like the Netherlands Jurists Committee for Human Rights, and specific training in the field of human rights at the law schools and as part of the *éducation permanente* of judges, prosecutors and the bar. Was it, at first, sometimes seen as a sign of lack of convincing arguments if a lawyer referred to a treaty provision before a court, nowadays, courts will sometimes even supplement the arguments of the applicant by applicable provisions of human rights treaties as part of their duty to supplement the law (“*jus curia novit*”).<sup>33)</sup> The actual picture, therefore, is that the human rights treaties to which the Netherlands is a party, are regarded as a fully integrated part of the Dutch legal order, with a very high, if not the highest status. Of course, this does not always result in a correct interpretation and application of these treaties by the competent authorities, as is shown, *inter alia*, by the judgments or views, as the case may be, of the international

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30) See: Gerards and Fleuren, *supra* note 2, p. 222.

31) E.A. Alkema, “Fundamental Human Rights and the Legal Order of the Netherlands”, in: H.F. van Panhuys a.o., (eds), *International Law in the Netherlands*, Part III (1980), pp. 109-146, p. 136.

32) P. van Dijk, “Domestic Status of Human-Rights Treaties. The Attitude of the Judiciary. The Dutch Case”, in: M. Novak a.o. (eds), *Fortschritt im Bewusstsein der Grund- und Menschenrechte* [Progress in the Spirit of Human Rights], Kehl am Rhein: N.P. Engel Verlag 1988, pp. 631-650.

33) See, e.g.: Administrative Jurisdiction Division of the Council of State, judgment of 1 October 2014, No. 201307705/1/A3, <[www.raadvanstate.nl](http://www.raadvanstate.nl)>, *N.N. v. the Council of the Municipality of Westerveld*, forthcoming in the Codices Database of the Venice Commission.



supervisory bodies in cases in which complaints against the Netherlands are examined.<sup>34)</sup>

In fact, the way in which the courts in the Netherlands interpret and apply human rights provisions in treaties in the framework of their “constitutional review” indirectly also influences the interpretation and application of the equivalent human rights provisions of the Constitution. This the more so since the latter provisions lack, in several respects, the specificity and clarity in which the international human rights standards have been formulated and have been interpreted by the respective international courts and supervisory bodies.<sup>35)</sup> Consequently, the international human rights provisions and relevant jurisprudence have their impact on the legislative, administrative and judicial practice in the Netherlands in cases where such provisions are (also) at issue. In actual practice, in those cases the legislature, administration or court, as the case may be, will - or at least should - also take into consideration the comparable treaty provision, in virtue of their obligation under Articles 93 and 94 of the Constitution to apply and give priority to self-executing provisions of treaties. Since, according to the prevailing doctrine,<sup>36)</sup> the obligation to give priority to a treaty provision over a conflicting provision of domestic law also applies to conflicting provisions of the Constitution, that obligation may even lead the courts to not applying a constitutional provision, if and to the extent that it is found not to be in conformity with a self-executing treaty provision. Practice shows, however, that the courts in the Netherlands

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34) The ECtHR, for instance, so far has found violations by the Netherlands in 85 judgments: some cases on Articles 10 (freedom of expression), 13 (right to an effective remedy) and 14 (prohibition of discrimination), as well as the procedural limbs of the rights enshrined in Articles 2 (right to life) and 3 (prohibition of torture). The majority of convictions related to Articles 6 (right to a fair hearing), 8 (right to respect for private and family life) and 5 (right to liberty and security). However, only a very small amount of cases is decided by judgment. See: *Country Press Report the Netherlands*, <[www.echr.coe.int](http://www.echr.coe.int)>. In 2014, for instance, 798 applications against the Netherlands were decided, of which 795 were declared inadmissible or struck out. Only three out of the 798 cases were decided by judgment (in which cases the Court found violations of Articles 5, 2 and 8 respectively; see: ECtHR 9 December 2014, *Geisterfer v. the Netherlands*, No. 15911/08; ECtHR (Grand Chamber) 20 November 2014, *Jaloud v. the Netherlands*, No. 47708/08; ECtHR (Grand Chamber) 3 October 2014, *Jeunesse v. the Netherlands*, No. 12738/10; for all three, see: <[hudoc.echr.coe.int](http://hudoc.echr.coe.int)>).

35) Thus, for instance, several fundamental rights may only be restricted by Act of Parliament, while no substantive requirements are set for the legislator.

36) See: P.P.T. Bovend'Eert a.o. (eds), *Grondwet Tekst & Commentaar* [The Constitution Text & Commentaries], Deventer: Kluwer 2004, p. 136. See also: *Kamerstukken II* [Parliamentary Documents] 15 049 (R 1100), No. 3, p. 13.

are rather inclined to interpret both applicable provisions in such a way that a conflict between them may be avoided; the so-called “embracing interpretation” or “treaty-conform interpretation”, which sometimes even amount to “treaty-conform supplementation of the law”.<sup>37)</sup> Its justification is, expressly or impliedly, found in the so-called “presumption theory”: the legislator may be supposed to have had the intention to keep or bring domestic law in conformity with the state’s international legal obligations.<sup>38)</sup> Examples derived from the case-law of the Administrative Jurisdiction Division of the Council of State, are cases in which the Division read provisions of the General Administrative Law Act in conformity with Article 6 ECHR.<sup>39)</sup>

#### IV. Protection of human rights in the Netherlands by the European Court of Human Rights

The protection of human rights in the Netherlands is not exclusively a matter of the competent Dutch authorities. As from 31 August 1954, the Netherlands is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Subsequently, the Netherlands also ratified all additional and amending Protocols, with the exception of Protocol No. 7. The binding force of the ECHR and its Protocols – with the exception of Protocol No. 7 – extends to all parts of the Kingdom.

Under the ECHR, a European Court of Human Rights (hereafter: ECtHR) has been established which, according to Article 19 of ECHR, is endowed with the function to ensure the observance of the engagements undertaken by the High Contracting Parties. Until the entry into force of Protocol No. 11 to the ECHR on 1 November 1998, the right to lodge an

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37) See: Van der Pot/Donner (revisited by D.J. Elzinga and R. de Lange), *Handboek van het Nederlands Staatsrecht* [Text Book on Dutch Constitutional Law], Deventer: Kluwer 2014, pp. 852-853. See also: Gerards and Fleuren, *supra* note 2, p. 227.

38) Thus already O. Schachter, “The obligation to Implement the Covenant in Domestic Law”, in: L. Henkin (ed.), *The International Bill of Rights; The Covenant on Civil and Political Rights*, New York: Columbia University Press 1981, pp. 311-331, pp. 318-319.

39) Administrative Jurisdiction Division of the Council of State, judgments of 4 June 2008, No. 200703206/1, *N.N. v. the Minister of Transport, Public Works and Water Management*, and of 4 March 2009, No. 200803215/1, *Foundation “Stichting Hogeschool Rotterdam” v. the Minister of Social Affairs and Employment*; see: <[www.raadvanstate.nl](http://www.raadvanstate.nl)>. Both judgments are forthcoming in the Codices Database of the Venice Commission.

application as a private party and the jurisdiction of the ECtHR were optional: the then still existing European Commission of Human Rights could receive such applications and the Court could give judgment only in cases against States that had accepted those competences. The Netherlands had made a declaration of acceptance to that effect on 5 July 1960.<sup>40)</sup> However, as from 1 November 1998, under Protocol No. 11 to the ECHR, the right of individual complaint and the jurisdiction of the ECtHR are compulsory for all the Contracting Parties.<sup>41)</sup>

Initially, the expectation in the Netherlands was that the entry into force of the ECHR and the binding jurisdiction of the ECtHR would hardly have consequences for the authorities in the Netherlands and for the individuals and legal persons under its jurisdiction. The prevailing opinion was that the level of protection of human rights in Dutch law and legal practice was such that the guarantees and supervisory mechanisms laid down in the ECHR would have little or no relevance for the Dutch legal order.<sup>42)</sup> In any case it was thought to be sufficient that the provisions of the ECHR could be relied upon before and applied by the Dutch courts. The international supervisory procedure, established by the ECHR, would serve to enable the Netherlands to watch the behaviour of their fellow-Contracting Parties and bring complaints against them if needed.<sup>43)</sup> And indeed, among the very few applications which the ECtHR dealt with during the first decade of its functioning, none was directed against the Netherlands. So, it came somewhat as an unpleasant surprise when the ECtHR found the Netherlands military disciplinary and criminal law as well as the Insane Persons Act to be in violation of Article 5 of ECHR.<sup>44)</sup> Were this still rather specific cases, a real wake-up call came from a judgment against

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40) For the Netherlands Antilles the declaration took effect as from 31 August 1974.

41) Under the same Protocol No. 11 the Commission and the Court have merged into a new Court.

42) See Egbert Myjer, "Dutch interpretation of the European Convention: a double system?", in: Matscher and Petzold (eds), *supra* note 12, pp. 421-430 at pp. 421-425, who enumerates five main reasons for this slow recognition of the relevance of the ECHR for Dutch legal practice: a) national arrogance; b) unfamiliarity with the ECHR; c) slow development of Strasbourg case-law; d) lack of tradition of constitutional review; and e) the spirit of the time.

43) The original Article 24 already created the possibility of inter-State applications. The present Article 33 reads as follows: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party."

44) ECtHR 8 June 1976, *Engel a.o. v. the Netherlands*, Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, <hudoc.echr.coe.int>; ECtHR 24 October 1979, *Winterwerp v. the Netherlands*, No. 6301/73, <hudoc.echr.coe.int>.

another State, Belgium, in 1979. The *Marckx* Case<sup>45)</sup> made it clear that also in the Netherlands inheritance law was discriminatory with respect to children born out of wedlock and had to be revised. A number of cases followed, in which the Netherlands law or practice was found to be in violation of one of the guarantees of the ECHR, such as that of fair trial and protection of family life.<sup>46)</sup>

As was said before, in the eighties the attitude, first of the judiciary and the bar, but ultimately also of the other authorities, changed in the sense that more attention was being paid to the ECHR and the Strasbourg case-law.

In conclusion it may be said that the existence of the ECHR and the functioning of its supervisory system, especially the case-law of the ECtHR,<sup>47)</sup> have had their impact on the interpretation and application of both national and international human rights standards by the legislature, the administration and the courts in the Netherlands as in the other Contracting Parties.<sup>48)</sup> In combination, the ECHR and the case-law relating thereto have created a *jus commune* in the field of human rights for the European society, in which the engagements undertaken by the High Contracting Parties are not governed by the traditional treaty law principle of reciprocity.<sup>49)</sup>

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45) ECtHR 13 June 1979, *Marckx v. Belgium*, No. 6833/74, <hudoc.echr.coe.int>.

46) See: Catelijne Engering and Nico Liborang, "Judgments of the European Court of Human Rights against the Netherlands and their effects: an overview 1960-1997", in: Tom Barkhuysen a.o. (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* 1999, pp. 29-61. For more recent data, see *supra*, note 35.

47) Originally, there was also the European Commission of Human Rights, which made a first examination of applications lodged by private parties and drafted a report with its (non-binding) conclusions. See: P van Dijk a.o. (eds), *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerp/Oxford: Intersentia 2006, pp. 32-35. A supervisory role is also played by the Committee of Ministers of the Council of Europe which, according to Article 46 ECHR, supervises the execution of the judgments of the ECtHR; see *idem*, pp. 44-46. Finally, the Secretary-General of the Council of Europe, according to Article 52 ECHR, may make inquiries of the manner in which the individual States ensure the effective implementation of the provisions of the ECHR in their internal law. See also: the Human Rights and Rule of Law section of the Council of Europe's website: <[www.coe.int/t/dghl/monitoring/execution/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/default_en.asp)>.

48) See H. Keller and A. Stone Sweet (eds), *A Europe of Rights. The Impact of the ECHR on National Legal Systems*, Oxford: Oxford University Press 2008.

49) ECtHR 18 January 1978, *Ireland v. the United Kingdom*, No. 5310/71, para. 239: "Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective' enforcement". See also

The ECtHR has designed the separate human rights provisions into broad European standards, against which national law and practice may be reviewed, and has developed interpretative mechanisms and techniques for that review. This way, the ECtHR has made the ECHR a living legal instrument. In fact, gradually the system of the ECHR has developed into a European constitutional order.<sup>50)</sup> For the victim of a violation of one or more provisions of the ECHR the supervisory mechanism may result in recognition of the violation, and in conviction of the Netherlands. As the ECtHR has stated, “a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.”<sup>51)</sup> It should be pointed out that not only the decisions and judgments of the ECtHR in cases against the Netherlands are relevant for the immediate practice and future legislation. In general, the interpretations given by the ECtHR of the provisions of the ECHR (the so-called “*res interpretata*”)<sup>52)</sup> determine the meaning thereof, and the scope of the obligations of all Contracting Parties. And, indeed, in the Interlaken Declaration of 2010, the Contracting Parties committed themselves to “taking into account the Court’s developing case-law, also with a view to considering the conclusions drawn from a judgment finding a violation of the Convention by another State, where the same problem exists within their own legal system”.<sup>53)</sup>

However, the way to this result is a very long one, and the outcome may not always be satisfactory.<sup>54)</sup> First of all, according to Article 35, paragraph 1, previously all available national procedures must have been exhausted, while, thereafter, the procedure before the

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the different contributions in: European Commission for Democracy through Law (Venice Commission), “The Status of International Treaties on Human Rights”, CDL-STD(2005)042-e, <www.venice.coe.int>.

50) The ECtHR refers to the ECHR as “a constitutional instrument of European public order”. See, e.g.,: ECtHR 23 March 1995, *Loizidou v. Turkey*, No. 15318/89, para. 75.

51) ECtHR 31 October 1995, *Papamichalopoulos a.o. v. Greece (Article 50)*, No. 14556/89, <hudoc.echr.coe.int>, para. 34.

52) See: Janneke Gerards, “The European Court of Human Rights and the national courts”, in: Gerards and Fleuren, *supra* note 2, pp. 13-93, pp. 21-23.

53) *High Level Conference on the Future of the European Court of Human Rights*, Declaration of Interlaken, 19 February 2010, <wcd.coe.int>, para. B.4.c.

54) See Tom Barkhuysen and Michiel van Emmerik, “Improving the implementation of Strasbourg and Geneva decisions in the Dutch legal order: reopening of closed cases or claims of damages against the state”, in: Barkhuysen a. o. (eds), *supra* note 47, pp. 3-27.

ECtHR may last for several years. Even if at the end the ECtHR finds a violation and decides that damages have to be paid to the victim, the amount fixed may not cover all damages suffered, while some of the most important material or immaterial damages, such as unjustified deprivation of liberty, cannot be undone or even shortened after such a long time, not even if the criminal case against the victim will be re-opened.<sup>55)</sup> This may imply that, while Article 13 of ECHR guarantees to everyone an effective legal remedy in case any of the rights and freedoms laid down therein has been violated, the Court procedure itself does not keep up with that guarantee.

A preliminary-rule procedure like the one that exists in EU law might partly remedy that situation, as it would enable the national courts to seek, in an early stage of the proceedings, an interpretation by the ECtHR of applicable provisions of the ECHR. Meanwhile, such a procedure has been proposed in Protocol No. 16 to the ECHR.<sup>56)</sup>

All this makes it clear that the most important and effective impact the ECHR and the case-law of the ECtHR bring about is that the same violations may be prevented in the future or, if they occur, may be remedied in domestic procedures without there being a need for a new way to Strasbourg. In this respect it is also important to note that a judgment of the ECtHR finding a violation may also imply that the State concerned will have to take preventive measures, in the legislative and/or administrative field,<sup>57)</sup> to the benefit of the applicant but also of potential other victims and under the supervision of the Committee of Ministers.<sup>58)</sup> Moreover, although the Court's reasoning will be attuned to the case before it,

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55) For criminal cases, the way for re-opening is provided by law: Article 457 of the Code of Criminal Procedure. See: Roeland Böcker and Herman von Hebel, "The enforcement of Strasbourg and Geneva decisions: the international law context", in: Barkhuysen a.o., *supra* note 47, pp. 235-241 at p. 235: "Litigants may often be left feeling that Strasbourg and Geneva judgments are Pyrrhic victories". See also: *idem*, p. 239.

56) Protocol of 2 October 2013, *Council of Europe Treaty Series* 214. Once this protocol will have entered into force, the national highest courts and tribunals may request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto; the requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. The Netherlands has signed, but not yet ratified Protocol No. 16. On the moment of writing (8 December 2015) only 5 countries – Albania, Georgia, Lithuania, San Marino and Slovenia – have ratified it, whereas, pursuant to Article 8 of Protocol No. 16, at least 10 ratifications are needed.

57) For a judgment in which the ECtHR indicated the necessity of legislative measures, see: ECtHR 26 March 1985, *X. and Y. v. the Netherlands*, No. 8978/80, <hudoc.echr.coe.int>, para. 27.

58) Article 46, paragraph 2, ECHR.

the interpretations of provisions of the ECHR laid down in its judgments, will have a general character and may, consequently, also have a remedying and preventive effect in other High Contracting Parties.<sup>59)</sup> In general, it may be stated that the Court's case-law, be it in cases where the complaint is directed against the Netherlands or in other cases, is carefully followed and analysed in Dutch legal practice and applied by Dutch courts, as long as the courts do not meet with what they consider to be the boundaries of their competences.<sup>60)</sup> For an example of the latter case, in relation to the exclusion of the right to vote of detained persons under guardianship, the Administrative Jurisdiction Division of the Council of State held that, in general, it could not be said that such exclusion amounted to an unreasonable limitation of Article 25 of the International Covenant on Civil and Political Rights, but that this might be different in the present case. However, answering the question of how a possible infringement should be solved would require the court to overstep the strict boundaries of its 'law-making powers'.<sup>61)</sup> This judgment led to the initiative on the part of the Government to amend Article 54 of the Constitution.

## V. Protection of human rights in the Netherlands by the Court of Justice of the European Union

Originally the European Union (hereafter: EU), under the previous name of European Economic Community (hereafter: EEC), was primarily an institution of cooperation in the fields of trade, economics, finances and taxation. Gradually it has entered into other domains which traditionally belonged to the sovereignty of the member States, such as social and cultural matters, criminal law and also the protection of human rights. For a long

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59) In many cases, the Court summarizes and analyses its own case-law. See, e.g., with regard to positive obligations to take all appropriate steps to safeguard life for the purposes of Article 2: ECtHR 24 July 2014, *Brincat a.o. v. Malta*, Nos 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, <hudoc.echr.coe.int>, paras 101-102. For another example, see also, in relation to the criteria for the applicability of the principle of *non bis in idem* under Article 4, paragraph 1, of Protocol No. 7 to the ECHR: ECtHR (Grand Chamber) 10 February 2009, *Zolotukhin v. Russia*, No. 14939/03, paras 52-53.

60) See Gerards and Fleuren, *supra* note 2, pp. 237-250.

61) Administrative Jurisdiction Division of the Council of State, judgment of 29 October 2003, No. 2003 00512/1, <www.raadvanstate.nl>, CODICES Database NED-2013-3- 007, *N.N. v. Mayor and Aldermen of Bloemendaal*.

time, the Treaty establishing the EEC did not contain a catalogue of human rights. Proposals for insertion of a reference to fundamental rights were rejected when the Treaty was drafted.<sup>62)</sup> However, step by step, the Court of Justice (hereafter: CoJ) of the EEC developed its own human rights case-law in which it drew inspiration from both the constitutional traditions common to the member States and the human rights treaties on which the member States had collaborated or of which they were signatories.<sup>63)</sup>

The situation changed when the European Council, at its meeting of 3 and 4 June 1999 in Cologne, decided to draw up a Charter of Fundamental Rights of the European Union.<sup>64)</sup> In the amended text of the Treaty on European Union, Article 6 refers to the Charter of Fundamental Rights of the European Union. Originally the Charter merely had the character of a solemn proclamation of the European Parliament, the Council and the Commission, but as from the 1st of December 2009 it has the same legal force as the Treaty on European Union itself. Moreover, Article 6, paragraph 2, stipulates that the EU shall accede to the ECHR, a development that is still in the process of preparation.<sup>65)</sup>

In the present situation, the CoJ EU applies the Charter of Fundamental Rights as part of written EU law, and, in addition, applies supplementary provisions of other international human rights instruments as well as human rights standards that are common to the legal systems of the member States. It does so, *inter alia*, in cases brought before it by the EU Commission against a member State<sup>66)</sup> and by a member State against another member State.<sup>67)</sup> Moreover, if in a case before a court in a member State a human rights issue is at stake that finds (also) regulation in EU law and the court concerned considers that a decision on the question is necessary to enable it to give judgment, it may, and if it is a court of final instance in the case, it is obliged to bring the matter before the CoJ EU, who will give a preliminary ruling on the issue that is binding for the national court concerned.<sup>68)</sup>

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62) See L. Betten, *The Right to Strike in Community Law*, Amsterdam: Elsevier Science Publishers 1985, p. 4.

63) See, e.g., CoJ EEC 14 May 1974, Case 4/73, *Nold v. Commission*, ECR 1974, p. 491, para. 13. See also: Koen Lenaerts and Eddy De Smijter, "A 'Bill of Rights' for the European Union", 38 *Common Market Law Review* 2001, pp. 273-300 at pp. 274-278.

64) Conclusions of the Presidency, point 1.64, 6 *EU Bulletin* 1999, p. 35.

65) See Jean Paul Jaqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms", 48 *Common Market Law Review* 2011, pp. 995-2011.

66) Article 258 Treaty on the Functioning of the EU.

67) Article 259 Treaty on the Functioning of the EU.

68) Article 267 Treaty on the Functioning of the EU.



The above description makes it clear that, nowadays, the CoJ EU has also an important role to play in supervising the way in which the authorities in the Netherlands interpret and apply human rights provisions laid down in the Constitution and in treaties like the ECHR, which have also been incorporated into the EU Charter. And, indeed, practice shows that nowadays the case-law of the CoJ EU has a substantial impact on Dutch human rights case-law and legal practice, especially in asylum and immigration cases. This was illustrated, for instance, by the cases of *X, Y and Z*, three applicants who were third country nationals<sup>69)</sup> seeking refugee status. They claimed that they had a well-founded fear of persecution based on their sexual orientation. The Administrative Jurisdiction Division of the Council of State requested the CoJ EU to answer questions concerning the assessment of applications for refugee status under the provisions of the Qualification Directive.<sup>70)</sup> The Division wished to know whether third country nationals who are homosexuals, form a particular social group in the meaning of the Directive, how national authorities should assess what constitutes an act of persecution concerning homosexual activities and whether the criminalisation of those activities in the applicant's country of origin with the possibility of imprisonment amounted to persecution.<sup>71)</sup> The CoJ EU ruled, *inter alia*, that the national authorities, when assessing an application for refugee status, may not reasonably expect the applicant, in order to avoid the risk of persecution, to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.<sup>72)</sup> In the light of the CoJ EU's judgment, the Administrative Jurisdiction Division of the Council of State then found for the asylum seekers.<sup>73)</sup>

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69) That is: from outside the European Union.

70) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *Official Journal of the European Union* L 304/12.

71) Administrative Jurisdiction Division of the Council of State, *inter alia* judgment of 18 April 2012, No. 201109928/1/T1/V2, <[www.raadvanstate.nl](http://www.raadvanstate.nl)>.

72) CoJ EU 7 November 2013, Joined Cases C199/12 to C201/12, *X, Y and Z*, <[curia.europa.eu](http://curia.europa.eu)>.

73) Administrative Jurisdiction Division of the Council of State, *inter alia* judgment of 18 December 2013, No. 201109928/1/1/V2, <[www.raadvanstate.nl](http://www.raadvanstate.nl)>. See also: CoJ EU (Grand Chamber) 5 September 2012, Joined Cases C71/11 and C99/11, *X and Y*, <[curia.europa.eu](http://curia.europa.eu)> on freedom of religion in relation to asylum applications. Many cases pending before the Administrative Jurisdiction Division of the Council of State had been stayed until the CoJ EU gave judgment. See, e.g.: Administrative Jurisdiction Division of the Council of State, judgment of 13 April 2012, No. 201009779/2/V2, <[www.raadvanstate.nl](http://www.raadvanstate.nl)>, *N.N. v. the Minister of Justice*.

## VI. Protection of human rights in the Netherlands by other international supervisory bodies

In addition, the Netherlands is subject to periodical and incidental supervision of other international supervisory bodies, which, however, do not have the power to make legally binding decisions but only give “views” and recommendations. Mention may be made of the periodical reporting procedures and examination of individual complaints by the European Committee of Social Rights under the European Social Charter. A case which recently received considerable publicity and political attention, was the complaint submitted by the Conference of European Churches (CEC).<sup>74)</sup> CEC alleged that, in the Netherlands, the relevant legislation and practice concerning illegal migrants were in violation of the right to social and medical emergency assistance and the right to housing under the European Social Charter. The Committee held that it had taken note of the rationale of the Dutch restrictive immigration policy and recognized that pursuant to international law States are indeed entitled to control the entry, residence and expulsion of aliens in their territory. It did not wish to call into question the legitimacy of this aim. Nevertheless, the Committee was unable to consider that the denial of emergency shelter to the individuals concerned, who continued to find themselves in the territory of the Netherlands, was an absolutely necessary measure to achieve the aims of immigration policy. Moreover, the Committee ruled that, in the light of its established case-law, shelter must be provided to illegal migrants, even when they are requested to leave the country and even though they may not claim that long-term accommodation in a more permanent housing be offered to them. The Committee recalled that the right to shelter was closely connected to the human dignity of every person regardless of his or her residence status. At a later stage, the Administrative Jurisdiction Division of the Council of State held that the requirement that the aliens concerned cooperate with a view to their repatriation, as a precondition for shelter (‘a bed, a bath and bread’), was lawful.<sup>75)</sup>

There is also a periodic reporting procedure and a system of examination of individual complaints before the Human Rights Committee under the International Covenant on Civil

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74) European Committee of Social Rights 1 July 2014, No. 90/2013, *CEC v. the Netherlands*, <[www.coe.int/socialcharter](http://www.coe.int/socialcharter)>.

75) Judgment of 26 November 2015, No. 201500577/1, *N.N. v. the Secretary of State*, <[www.raadvanstate.nl](http://www.raadvanstate.nl)>, forthcoming in the CODICES Database.

and Political Rights and a periodic reporting procedure under the International Covenant on Economic Social and Cultural Rights.<sup>76)</sup> Furthermore, there are several other supervisory procedures, in relation to the Conventions of the International Labour Organisation, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child.<sup>77)</sup>

All these instruments and supervisory mechanisms have a certain impact on the case-law and legal practice in the Netherlands in the field of human rights.<sup>78)</sup> However, the fact that the views expressed by the supervisory bodies concerned are not legally binding, may influence their effectiveness.

As a recent example, reference may be made to the SGP Case.<sup>79)</sup> The Reformed Political Party (Dutch abbreviation: SGP) is based on strict Calvinism and aims at a government based on strict biblical teachings. At the time, it did not allow women to represent the party in political bodies. Civil law proceedings against the SGP led to a judgment of the District Court in The Hague,<sup>80)</sup> declaring that the State, by granting the usual annual subsidy to the

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76) See: Philip Alston (ed.), *The United Nations and Human Rights*, Oxford: Clarendon Press 1992; Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring*, Cambridge: University Press 2000.

77) On the 31st of December 2014, the Dutch government had been faced with fourteen complaints against the Netherlands before UN Committees: nine before the UN Human Rights Committee, two before the UN Committee on the Elimination of Discrimination against Women and, finally, three before the UN Committee Against Torture. See: *Rapport 2014* [Report 2014] by the International Law Department of the Ministry of Foreign Affairs, <[www.rijksoverheid.nl](http://www.rijksoverheid.nl)>, pp. 60-61.

78) See: Ineke Boerefijn, "Follow-up of the views of the United Nations treaty bodies", in: Barkhuysen a.o. (eds), supra note 47, pp. 101-112, and *idem*, "Partnership between National Human Rights Institutions and Human Rights Treaty Bodies in the Implementation of Concluding Observations", in: Yves Haeck a.o. (eds), *The Realisation of Human Rights: When Theory Meets Practice; Studies in Honour of Leo Zwaak*, Cambridge/Antwerp/Portland: Intersentia 2014, pp. 439-459.

79) Administrative Jurisdiction Division of the Council of State, judgment of 5 December 2007, No. 200609224/1, CODICES Database 2007-3-006. On this judgment, see also: Marjolein van Roosmalen and Ben Vermeulen, "Constitutional Review by the Dutch Courts. A View from Kneuterdijk 22", in: Marjolein van Roosmalen a.o., *Fundamental Rights and Principles. Liber Amicorum Pieter van Dijk*, Cambridge/Antwerp/Portland: Intersentia 2013, pp. 563-581 at pp. 574-576.

80) District Court The Hague, 7 September 2005, *Nederlandse Jurisprudentie* [Dutch Case-Law] 2005, 473.

SGP, had acted in breach of Article 7 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women.<sup>81)</sup> And, indeed, the Committee, set up under the Convention to supervise its implementation by the Contracting States, after examining a periodical report of the Netherlands, had found the Netherlands in violation of this provision. Later on, administrative proceedings were introduced to challenge the legality of the government decision to grant the subsidy. On appeal, the Administrative Jurisdiction Division of the Council of State held that the most relevant parts of Article 7 of the Convention were directly applicable in terms of Article 94 of the Constitution, but that this provision did not rule out a balancing between the equality norm, on the one hand, and other fundamental rights, including the freedom of religion and association, on the other. In the opinion of the Administrative Jurisdiction Division, this followed from the legislative history of the Convention and of the Act of Parliament approving the Convention. Further, the Administrative Jurisdiction Division held that the legislative history of the Political Parties (Subsidies) Act 1999, on which the granting of the subsidy was based, showed that the Act was aimed at the maintenance of the variety of political parties in the Dutch democratic system as a vital element of that system. In view of Article 7 of the Convention, the legislator had included Article 16 in the Political Parties (Subsidies) Act 1999, with the intention to leave the judgment on the functioning and accountability of political parties to the (criminal) court, rather than subjecting them to decision-making by the administration. In the opinion of the Administrative Jurisdiction Division, the legislator had not been unreasonable in the weighing of the interests involved. Women could obtain full membership of the SGP, and could, if they did not agree with certain restrictions applied to them as members, join another party or found their own party. Parties, such as the SGP, which had a tradition regarding equality between the sexes which differed from prevailing opinions and legal developments, should be able to conduct debates unhampered, within the boundaries set by criminal law. This was thought to be in line with the case-law of the European Court of Human Rights regarding the banning of political parties.<sup>82)</sup> Thus, the Administrative Jurisdiction Division took account of the applicable international law and of the views expressed by the international supervisory body concerned, but introduced its own system of weighing fundamental rights and interests.<sup>83)</sup>

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81) See *supra* note 19.

82) See: ECtHR (Grand Chamber) 8 December 1999, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, No. 23885/94, para. 44, and ECtHR (Grand Chamber) 13 February 2002, *Refah Partisi v. Turkey*, Nos 41340/98 and 41342/98-41344/98, para. 102.

## VII. Implementation and execution in the Netherlands of decisions or views of international bodies

From the above chapters it becomes clear that both the domestic courts and the international courts and other supervisory bodies play a role in the interpretation and application of human rights standards in the Netherlands. While the Dutch courts interpret and apply the human rights provisions of both their Constitution and international treaties to which the Netherlands is a party, the international bodies have to restrict themselves to the provisions of the treaty under which they have been established. However, in actual practice this distinction is not as absolute as it may seem at first sight. First of all, international supervisory bodies have shown many times that they consider themselves competent, when interpreting and applying a provision of a particular treaty, to take into account similar provisions of other treaties and the way they have been interpreted by the respective competent bodies.<sup>84)</sup> Moreover, judgments and “views” of international supervisory bodies, although relating to applicable international law, may have a direct impact on the way Dutch courts interpret and apply human rights provisions of their national law, especially the Constitution. And, vice versa, the way in which Dutch courts interpret and apply these provisions of national law, may influence the interpretation by international bodies of comparable treaty provisions. In this way, one may really speak of a common responsibility and a common effort. If this functions well, as it should but not always does, it may lead to “a dialogue of judges”, the need for which has often been emphasised by the ECtHR.<sup>85)</sup>

In the Netherlands it has become common opinion that interpretations given by the

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83) See, however: ECtHR 10 July 2012, *Staatkundig Gereformeerde Partij v. the Netherlands*, No. 58369/10, where the Court, on its turn, emphasised the importance of the equality norm.

84) See B.E.P. Myjer, “The Application of the Basic Principles by International Bodies such as the European Court of Human Rights”, in: Lawyers for Lawyers (ed.), *Building on Basic Principles, 25 Years Lawyers for Lawyers*, Leiden: Stichting NJCM-Boekerij 2011, pp. 11-24.

85) See A.M. Slaugther, “A Global Community of Courts”, 44 *Harvard International Law Journal* 2003, p. 191-219; Michael O’Boyle, “The Role of Dialogue in the Relationship between the European Court of Human Rights and National Courts”, in: Yves Haeck a.o. (eds), *The Realisation of Human Rights: When Theory Meets Practice; Studies in Honour of Leo Zwaak*, Cambridge/Antwerp/Portland: Intersentia 2014, pp. 91-105. Since 2006, the ECtHR organises a seminar of members of the Court and members of the highest courts of the Contracting Parties on a yearly basis at the occasion of the opening of the judicial year, discussing different aspects of this “dialogue”; see: <[www.echr.coe.int](http://www.echr.coe.int)>.

ECtHR of the ECHR constitute part and parcel of the provisions concerned and, consequently, have to be taken into consideration by the national courts in future cases when interpreting these provisions and comparable provisions of their national law.<sup>86)</sup> The same holds good, a fortiori, for the interpretations given by the CoJ EU, since a Dutch court which does not wish to follow a previous interpretation by the Court in a judgment or preliminary ruling, will have to submit the issue of compatibility of a human rights provision of national law with EU law to the CoJ EU, at least if it judges in final instance. This means that the “dialogue of judges” in fact still appears to be largely a one-way street.

The “views” of the other supervisory bodies also have to be taken into account, but since they are not legally binding, the Dutch courts appear less inclined to follow them straight forward, in particular if the interpretation of the scope of a certain treaty obligation by those bodies sometimes seems to them to be rather far-fetched and following that interpretation would create a certain tension between the judicial domain and that of the other State powers.<sup>87)</sup>

### **VIII. Concluding observation:**

#### **international (quasi-)judicial review in the field of human right; positive evaluation and some cause for concern**

The “favourable” status which the Netherlands Constitution and Dutch doctrine have granted to international treaties in general and human rights treaties in particular, and the resulting rather high authority of the international courts and supervisory bodies, have had a fertilising effect on the protection of human rights in the Netherlands, especially since the human rights provisions in the Constitution have played a modest role so far and the Netherlands have only a restricted tradition of constitutional review *stricto sensu*.

However, in the last decennium there have been signs that this high status is considered

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86) See, e.g.,: ‘Onze Straatsburgse rechter over het EVRM. Interview met S.K. Martens’ [Our Strasbourg Judge on the ECHR. Interview with S.K. Martens], *Nederlands Juristenblad* [Dutch Lawyers Periodical] 1991, pp. 465-476, p. 475; J. Gerards, *EVRM Algemene Beginselen* [ECHR General Principles], Den Haag: Sdu 2011, p. 30.

87) See, e.g.,: Administrative Jurisdiction Division of the Council of State, judgment of 26 November 2015, *supra* note 76, where the Division set a limitation to the obligation construed by the European Committee of Social Rights to provide shelter, in view of the Government policy to promote repatriation of aliens who had not obtained a residence permit.

by some to also have certain undesirable side-effects. Especially in relation to the ECtHR concern has been raised that this court has given the scope of its competences such a breath and at the same time has followed such an intrusive way of interpreting the obligations laid down therein, that the Contracting Parties are no longer the masters of the ECHR and are faced with several new and unforeseen obligations that constitute an intrusion on their sovereignty by an institution that has no democratic legitimacy.<sup>88)</sup> And, indeed, it cannot be denied that the “evolutive” interpretation given by the ECtHR to certain provisions of the ECHR, has stretched these provisions in some cases beyond the original intention of its drafters.<sup>89)</sup> It would seem, therefore, that in order to preserve the authority of the ECtHR and the fruitful interaction between its case-law and that of the courts of the Contracting Parties, a balance has to be kept – and where necessary restored – between, on the one hand, honouring the fact that the Contracting Parties are “the masters of the treaty” and, on the other hand, recognising that, in that same treaty, the Contracting Parties have endowed the ECtHR with the power to, in a binding way, give the final interpretation of its provisions.

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88) See: Gerards and Fleuren, *supra* note 2, pp. 251-256.

89) *Idem*, *supra* note 2, pp. 1-6.